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May 25, 2010

**Via Electronic Filing**

Ms. LaDonna Castañuela  
Chief Clerk (MC 105)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: In the Matter of the Application by Farmersville Investors, L.P.  
for TPDES Permit No. WQ0014778001  
TCEQ Docket No. 2008-1305-MWD; SOAH Docket No. 582-09-2895

Dear Ms. Castañuela:

Enclosed for electronic filing please find the original of a Applicant's Response to OPIC Motion to Strike in the above-referenced matter.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

  
John R. Moore

JRM/jg  
1138622  
ENCLOSURES

cc: Service List (via facsimile)  
Mr. Kyle Kruppa  
Mr. Brad B. Castleberry  
Mr. Jeffrey S. Reed

## **Service List**

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### **FOR THE STATE OFFICE OF ADMINISTRATIVE HEARINGS:**

The Honorable Sharon Cloninger  
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**SOAH DOCKET NO. 582-09-2895  
TCEQ DOCKET NO. 2008-1305-MWD**

<b>APPLICATION OF FARMERSVILLE</b>	<b>§ TO THE COMMISSIONERS</b>
	<b>§</b>
<b>INVESTORS, LP, FOR TPDES</b>	<b>§ OF THE TEXAS COMMISSION ON</b>
	<b>§</b>
<b>PERMIT NO. WQ0014778001</b>	<b>§ ENVIRONMENTAL QUALITY</b>

**APPLICANT'S RESPONSE TO  
OPIC MOTION TO STRIKE**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:**

COMES NOW APPLICANT, Farmersville Investors, LP ("Farmersville"), and files its Response to the Motion to Strike filed by the Office of Public Interest Counsel ("OPIC"). Since that filing, the Protestants in this case, James A. and Shirley Martin have filed an Objection to the ALJ's Recommendation to Reopen the Record. OPIC and Protestants suggest that Applicant is somehow offering evidence outside the record to subvert the contested case process. Applicant is not now and has not previously offered the deposition testimony of James Michalk into the record.

It is Applicant's position that the testimony that OPIC finds objectionable is not in the record and Applicant has not offered the testimony into evidence. Applicant further agrees with Protestants that it would be inappropriate to reopen the record. However, while Applicant, Protestants and OPIC apparently agree that the testimony should not be considered part of the record, Applicant believes some background is necessary.

The "evidence" which OPIC finds objectionable is all related to the question of whether additional computer modeling of oxygen related constituents of the treated effluent should be performed to apply computer input parameters specific to the rare occasions when the water level of Lake Lavon is high enough that the discharge could be directly to the lake. The suggestion

that such modeling should be performed was made by OPIC in its closing argument and its response to closing arguments of other parties.

All expert witnesses testified that (1) the stream was properly characterized and that, (2) given the characterization of the stream, the computer modeling performed by the Executive Director and confirmed by experts of the Applicant was proper.<sup>1</sup> OPIC's suggestion of additional computer modeling was made without any basis in evidence from OPIC (or Protestants). OPIC did not participate in the deposition of Mr. Michalk (although it had the opportunity to do so). Neither OPIC nor Protestants performed any cross-examination of Mr. Michalk or Dr. Young (Applicant's computer modeling expert) regarding proper computer modeling of oxygen related constituents.

Any additional/alternative modeling should properly be determined to be irrelevant, and is certainly unnecessary to the findings made by the Administrative Law Judge that the discharge will be to an intermittent stream and that the computer modeling of oxygen related constituents was properly performed in light of the receiving water body's classification as an intermittent stream.

Chapter 307 of the Commission's rules, *Texas Surface Water Quality Standards*, establishes the standards for protection of surface water, including those related to discharges of treated effluent from privately owned wastewater treatment plants, such as that at issue in this proceeding. The *Texas Surface Water Quality Standards* are a "statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency."<sup>2</sup>

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<sup>1</sup> See Exceptions and Responses to Exceptions of Applicant and Executive Director.

<sup>2</sup> TEX. WATER CODE §5.103(c).

The Executive Director of the TCEQ has published its “*Procedures to Implement the Texas Surface Water Quality Standards*”<sup>3</sup> (also referred to as “IPs”). The IPs are a Guidance published by the TCEQ and are a “statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.” The Executive Director has also established standard operating procedures for performance of computer modeling to implement the *Texas Surface Water Quality Standards* and the IPs. “*Water Quality Assessment Team – Evaluating TPDES Permit Applications Using a Continuously Stirred Tank Reactor (CSTR) Model.*” (“*CSTR Model Procedures*”)<sup>4</sup> The *CSTR Model Procedures* are also a “statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.”

The evidence in the record and the findings of the Administrative Law Judge are that the Applicant and Executive Director’s staff complied with the *Texas Surface Water Quality Standards*, the IPs and the *CSTR Model Procedures*. It would now be an error for the Commission to require the Applicant or the Executive Director to perform some modeling other than that performed pursuant to the *Texas Surface Water Quality Standards*, the IPs and the *CSTR Model Procedures*. **TEXAS WATER CODE §5.103(c)** provides:

Rules shall be adopted in the manner provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The commission shall follow its own rules as adopted until it changes them in accordance with the Act.

(Emphasis added.) If the Commission were to require the Applicant and/or ED to perform modeling in a manner contrary to the *Texas Surface Water Quality Standards*, the IPs and the *CSTR Model Procedures*, it would be doing so in violation of **TEXAS WATER CODE §5.103(c)**.

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<sup>3</sup> Entered into evidence as Exhibit ED-12.

<sup>4</sup> See, e.g.; Executive Director’s Exceptions to the Administrative Law Judge’s Proposal for Decision, Appendix B.

Because it would be error for the Commission to consider modeling inconsistent with the *Texas Surface Water Quality Standards*, the *IPs* and the *CSTR Model Procedures*, Applicant joins Protestants in urging the Administrative Law Judge to withdraw her recommendation that the Commission accept the deposition testimony of Mr. James Michalk. Applicant further opposes all suggestions that additional computer modeling of oxygen related parameters be required or allowed.

Respectfully submitted,

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**ATTORNEYS FOR APPLICANT**  
**FARMERSVILLE INVESTORS, LP**

## CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of May, 2010, a true and correct copy of the foregoing Applicant's Response to Motion to Strike was provided by U.S. mail, hand-delivery, or facsimile to the persons listed below:

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